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Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1192

R. E. KELLERMAN, TED WEINER and NICHOLS & COMPANY,

Petitioners,

versus

PRESTON J. MILLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MAY IT PLEASE THE COURT:

Respondent, Preston J. Miller, respectfully submits this brief in opposition to petitioners', R. E. Kellerman, Ted Weiner and Nichols & Company, application for a writ of certiorari to review the judgment of the United States Court of Appeals, Fifth Circuit, entered on December 16, 1965, rehearing denied January 25, 1966.

STATEMENT OF THE CASE.

This is a dispute between private parties, citizens of the State of Texas and the plaintiff-respondent

herein, Preston J. Miller, a citizen of Vermilion Parish, Louisiana. This suit was filed in the Louisiana District Court of Vermilion Parish, Louisiana, and was removed by the petitioners herein to the United States District Court. Respondent, Preston J. Miller, granted an oil and gas lease to petitioner, R. E. Kellerman, dated May 5, 1956. Interests in the lease were assigned to petitioners, Ted Weiner and Nichols & Company, hereinafter referred to as "Kellerman" and the defendants-petitioners herein, have never taken any action whatsoever to the drilling of a well or other development of the Miller Lease premises and assert that they had no legal obligation so to do.

The Miller Lease provides for a primary term of three years, commencing May 5, 1956, and contains the customary "unless clause" which provides for the automatic termination of the lease at the end of the first year *unless* the lessee commenced the drilling of a well on the land or on acreage pooled therewith or paid a delay rental of *$3,900.00;* only in which event would the lease be kept in effect until May 5, 1958, at which time a payment of *$7,800.00* would be due to maintain the lease for another year, or until May 5, 1959, without drilling. Kellerman deposited $3,900.00 to the account of Preston J. Miller prior to May 5, 1957, and again deposited only $3,900.00 prior to May 5, 1958. The pertinent language of the Miller Lease is found in Paragraph 3 thereof, which provides as follows:

> "*This lease shall terminate* on the 5th day of May, 1957, *unless* on or before said date the lessee either (1) commences the drilling (spudding in)

> of a well on the land *or on acreage pooled therewith after notice and hearing* pursuant to an order of the Louisiana Department of Conservation, in search of oil, gas or other minerals and thereafter continues such operations and drilling to completion or abandonment; or (2) pays to the Lessor a rental of Three Thousand Nine Hundred and No/100 ($3,900.00) Dollars, which payment shall maintain Lessee's right in effect without drilling operations for one (1) year from the date last above mentioned: and Lessee may continue to maintain the rights granted without drilling operations for successive twelve (12) months' (sic). (during the primary term) by paying Lessor on or before the beginning of such respective periods *Seven Thousand Eight Hundred and No/100 ($7,800.00) Dollars for the land to be held hereunder by rental payment.* Payments may be made to the Lessor or may be mailed or delivered for deposit to Lessor's credit in The First National Bank of Abbeville, ..." (R. 61.)

Thus, when only $3,900.00 instead of the $7,800.00 due was paid, the lease terminated on May 5, 1958 under its own terms.

On March 4, 1957, the Durke Well was drilled approximately 2,440 feet north of the Miller Lease (R. 40) and a Conservation Order No. 367 was issued as to the upper stratum or productive sand which underlies the Miller Lease property only, namely the Cristellaria 6 Sand, the unit for which are set forth pursuant to this order (R. 86) by a plat filed in the

record at R. 90, which was revised by another plat, shown at R. 85.

There are five productive sand strata which underlie the Miller Lease property, and this Conservation Order affected only one stratum, namely that "between the depths of 11,552 feet and 11,682 feet and the correlatives thereto in other wells" as defined in Order No. 367, under "Definition" and set forth at R. 86. The four deeper sands which underlie the Miller Lease premises are, in order of depth:

Cristellaria -6 Sand, (C-6)

Siphonini-davisi-1 Sand, (SD-1)

Siphonini-davisi-2 Sand, (SD-2)

Siphonini-davisi-3 Sand, (SD-3)

Siphonini-davisi-4 (Nunez) Sand, (SD-4).

all as shown on Plat I, which is annexed as appendix p. 35.

Thus, at the time the due date of the first delay rental, May 5, 1958, only the northern half of the *uppermost* (C-6) Sand was contained in the Conservation Unit and there was no drilling or development of either the southern half of the uppermost sand or any of the deeper sands, by unitization or by actual drilling of wells. Therefore, the defendants-petitioners, Kellerman, deposited $3,900.00 to the bank account of Miller before May 5, 1958. The Durke Well

was completed in both the upper (C-6) Sand as well as the lower SD-1 Sand, which was not unitized, however, the Durke Well did not produce from either of these sands until *May 25, 1958,* after the second delay rental due date of May 5, 1958 (Stipulation IV, R. 41).

Thus, the situation was as shown on Plat II, appendix p. 36, at the time that the first delay rental was paid by check deposited to the account of Miller.

In the course of the next year, a Conservation Order was granted prescribing drilling units for the SD-1 Sand, so that the Miller Lease was pooled into two units as to the C-6 and SD-1 Sand, but not as to any units as to the lower three sands, the SD-2, SD-3 and SD-4 (Nunez) Sands, on May 5, 1958.

There was no drilling by the defendant-petitioners herein or others on the unit and there was no production from the Durke Well until 20 days after the delay rental date (Stipulation IV, XII; R. 41, R. 44) and although Paragraph 3, quoted above, clearly states that the amount of $7,800.00 was due, only $3,900.00 was deposited to Miller's bank account prior to May 5, 1958 (Stipulation IX, R. 43).

Thus, at the time that only one-half the amount due was paid the situation was as shown on Plat III, appendix p. 37.

The defendants-petitioners herein never drilled to develop any part of the Miller Lease, but drilling was done by other companies on the unitized acreage as follows:

On July 19, 1958 Superior Oil Company commenced drilling the Bernard Well, approximately 390 feet west of the Miller land, which struck the deeper sands, the SD-2 and SD-3 sands at a point 390 feet away from Miller's property, which sands were not unitized by an order of the Conservation Department until after suit was filed, and the defendants-petitioners herein, Kellerman et al., never attempted to drill to these deeper sands or to develop them.

Other wells were drilled surrounding the Miller Lease property to these deeper non-unitized sands as shown on the attached Plats, 4, 5 and 6, so that at the time of filing the petition, Miller's property was surrounded by wells capable of producing from these deeper sands.

Only the upper two sands, the C-6 and SD-1 sands were unitized, and only a pittance of the possible production surrounding the Miller Lease premises was obtained by Miller.

Miller addressed a letter to Kellerman on November 16, 1961, demanding that the Miller Lease be released, which was refused by Kellerman, and on December 28, 1961, suit was filed in the Louisiana court to have the lease declared cancelled. Kellerman et al. removed the suit to the United States District Court for the Western District of Louisiana, and filed a motion for summary judgment, with attached exhibits (R. 27).

From the attached Df. Exhibit "B" (see R. 79, Stip. IX, R. 43) for the first time, Miller learned that

the improper ($3,900.00) delay rental had been deposited to his bank account prior to May 5, 1958 and filed a supplemental petition for judgment determining that the lease automatically terminated for improper payment of delay rental at that time (R. 28), which petition was further supplemented and amended (R. 30) and to which the defendants, Kellerman et al., answered admitting that only $3,900.00 was paid, but asserting that the payment of $3,900.00 on or about April 23, 1958, constituted full payment of the delay rentals due plaintiff on or before May 5, 1958 under the terms of the lease (R. 33, Par. I) and specially pled the prescription of three years for the collection of the balance due (R. 34, Par. IV).

When, after the discovering from the exhibits filed by Kellerman et al., in connection with their motion for summary judgment, that only one-half of the $7,800.00 due as delay rentals before May 5, 1958, had been deposited to Miller's bank account in Abbeville, attorneys for Miller transmitted his check to Kellerman in the amount of $3,900.00 as a refund of the delay rental payment made on April 23, 1958, and in addition delivered Miller its check for $3,900.00, not as an unconditional tender of payment and recognizing its mistake, but with the flat statement that payment of this amount should not be considered *as an admission of any error:*

> "We believe that there is a serious question as to whether or not this additional rental payment is due under the lease, but the payment is being made to you in order to protect our clients' rights under the above lease. Payment of this amount should *not be considered as an admis-*

> *sion of any error* and the prior payment of delay rentals by our clients. Furthermore, our clients *fully reserve their rights to obtain a judicial determination* as to the necessity of this additional payment in pending litigation filed by you or in other appropriate judicial proceedings." (R. 177, line 15 et seq.)

and indeed pled the prescription of three years as a bar to the collection of the additional $3,900.00 delay rental due by Miller. (R. 34 line 12: IV).

> "Defendants specially plead the prescription of three (3) years for the collection of amounts due as rentals."

The lease was declared terminated as of May 5, 1958, when the District Court concurred that the improper delay rental had been paid, under the doctrine of *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119 which states that according to the plain provisions of the type of contract known as the "unless lease", the Lessee is under no duty either to drill or to pay delay rentals, but that if he neither drills nor pays the lease ipso facto terminates at the time of default (R. 207; 204). The District Court carefully distinguished the *Jones* case, city by petitioners herein, at R. 204 to R. 206, pointing out:

> "We emphasize that the circumstances warranting application of equity must appear with convincing clarity. Here, the lease stated in dollars and cents the exact amount of the annual rentals ($7,800) and there have been no segregated part of the land covered by the lease. The

payment of only $3,900 was not a likely or reasonable mistake." (R. 206, line 12.)

". . . This opinion has been lengthy, but its thesis is simple: The lease was at an end immediately upon non-payment of the proper rental on May 5, 1958. According to the plain provisions of the 'unless' lease, as universally interpreted, the lessee is under no duty to either drill or pay: if he either drills or pays the lease remains in effect, but if he does neither, it ipso facto terminates. The mere discovery of oil and unitization does not suffice. There must be production." (R. 219, line 14 et seq.)

The application for a new trial was denied (R. 223) and appeal was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment below:

"We have reached the conclusion that the trial court made a proper interpretation of the lease as to the payment of delay rentals and the default of the appellant-lessees, in failing to make such payments according to the terms of the lease. We are unable to render any more reasonable interpretation of the lease after a meticulous consideration of the other possible interpretations of its provisions. The opinion of the trial court reflects a cautious and careful consideration of the equitable principles involved. We are unable to disagree with his interpretation, or to find any improper application of these principles in the exercise of a wise discretion which must guide the court in circumstances and under the

facts presented in this case." (See pages 37, 38 of appendix, petitioners' brief herein.)

The motion for new trial was denied and petitioners-defendants-appellants below have applied for certiorari to this court.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Petitioners' application for a writ of certiorari is premised on the argument that the judgment rendered by the United States District Court, which was subsequently affirmed by the Court of Appeals for the Fifth Circuit, results in the application of one rule of law for litigants in the state courts of Louisiana, where the effect of an Order of the Louisiana Commissioner of Conservation is concerned, and another rule of law for those litigating the same question in the Federal courts.

It is respectfully submitted that the Court of Appeals and the United States District Court followed well settled Louisiana law and correctly applied same to facts and issues presented by this case. This is all that is required under the *Erie* doctrine and renders unnecessary the invocation of this Honorable Court's jurisdiction on writ of certiorari.

I. THE ORDER OF THE COMMISSIONER OF CONSERVATION DID NOT SUPERSEDE THE "UNLESS CLAUSE" OF THE MILLER LEASE.

Petitioners, Kellerman, have advanced the argument that the Court of Appeals erred in holding that

the Miller Lease terminated under the "unless clause", notwithstanding the Order of the Commissioner of Conservation. In support of this argument, the cases of *Sohio Petroleum Company v. U. S. & P. R. R.*, 62 So. 2d 615 (La. S. Ct. 1952), and *Delatte v. Woods*, 94 So. 2d 281 (La. S. Ct. 1957) are cited for the proposition that the inclusion of a portion of a lease in a conservation unit around a shut-in gas well maintains the lease in effect without the payment of delay retails.

Before distinguishing the *Sohio* and *Delatte* decisions, *supra*, there are certain features of the "unless clause" as interpreted by the Louisiana Courts, that merit discussion.

When the "unless clause" is used, as it was in Paragraph 3 of the Miller Lease (R. 61), the lessee *does not* covenant or obligate himself to drill or pay delay rentals. However, the failure of the lessee to drill or pay the stipulated delay rental automatically terminates the lease. *Baker v. Potter*, 223 La. 274, 65 So. 2d 598 (La. S. Ct. 1953); *Amos v. Waggoner*, 229 La. 134, 85 So. 2d 58 (La. S. Ct. 1956); *Johnson v. Smallenberger*, 347 La. 11, 110 So. 2d 119 (La. S. Ct. 1959); *Rushing v. Griffin*, 240 La. 31, 121 So. 2d 229 (La. S. Ct. 1960); and *Broussard v. Phillips Petroleum Co.*, 160 F. Supp. 905 (1958), affirmed per curiam 265 F. 2d 221 (CCA, 5th, La. 1959). Accordingly, as demonstrated by the above cited authorities, the lessee has three (3) options as distinguished from the obligations, which he covenants under the further terms of the lease: (1) to drill, (2) or to pay the stipulated delay rental, (3) terminate the lease by doing nothing.

In addition to the interpretation of the "unless clause", as enunciated above by the Louisiana Courts, the mode of exercising the options to drill, pay delay rentals, or terminate the lease, depends entirely upon the terms of the lease, and the type of conservation unit.

In the instant case, Paragraph 3 of the Miller Lease (R. 61) provided for the termination of the lease "unless * * * the Lessee either (1) commences the drilling (spudding in) of a well on the land, or on acreage pooled therewith after notice and hearing pursuant to an order of the Louisiana Department of Conservation * * *" or pays a stipulated delay rental, (R. 61). The word "after" in this paragraph is paramount in determining the effect of the conservation unit on the drilling option, and renders the *Sohio* and *Delatte* decisions, *supra,* inapplicable to the facts of the instant case.

In the *Delatte* case, *supra,* the court had before it the following lease provisions:

> "The lease in controversy contained the customary stipulation that if operations for the drilling of a well should not be commenced within one year from its date the same should terminate as to both parties unless on or before its anniversary date the lessee should pay or tender to the lessor or deposit to his credit in a designated bank $50 per acre, or $3,000 per year, which would cover the privilege of deferring commencement of drilling operations for an additional period of twelve months.

"The original lease further provided that it should remain in force for the primary term of two years from date and as long thereafter as oil, gas or any other minerals are produced therefrom or production is had from any part of the acreage with which said leased premises is pooled, in which latter event the lessee's drilling obligation becomes fulfilled by such production.

"It further provided that upon the completion of a well capable of producing gas in commercial quantities which was not being sold or utilized off the premises, the lessee shall pay lessor at the rate of $200 per year, payable quarterly, for such time as said gas is not sold or utilized off the premises, and that such payment would be construed as production of gas from said land.

"*It is further stipulated* in said lease that '*Lessee, at its option, is hereby given the right* and power without Lessor's joinder *to pool* or combine the acreage, royalty, or mineral estate covered by this lease, or any portion thereof, with other land, lease or leases, royalty and mineral estates in the immediate vicinity thereof, when, in Lessee's judgment, it is necessary or advisable to do so in order to properly develop and operate said leased premises so as to promote the conservation of oil, gas or other minerals in and under that may be produced from said premises, * * *'. And that '*Drilling or reworking operations* on or production of oil, gas, sulphur or other minerals *from land included in such pooled unit shall have the same effect in continuing this lease*

in force and effect during or after the primary term *as to all of the land covered hereby as if such operations were on or such production were from land covered hereby.'* And that 'In the event that any part of the land herein leased is now, or by assignment or otherwise hereafter may become, segregated from any other part, commencement of operations for the drilling of a well, the drilling of any well, and/or the production of oil, gas, sulphur or other minerals or casinghead gasoline on any part of the above-described land or any acreage pooled therewith, shall protect and hold under this lease all tracts of said land whether segregated or not.'"

Delatte v. Woods, 94 So. 2d 281, at pages 283, 284. (Emphasis added.)

It is readily apparent that the lease in the *Delatte* case, *supra,* specifically provided that drilling operations on any part of the lease premises or acreage pooled therewith satisfied the drilling provision of the "unless clause". Furthermore, the latter quoted provision of the *Delatte* lease, rather than containing a "Pugh Clause", as found in the Miller Lease (R. 71), specifically provided that drilling on acreage pooled with the leased premises had "the same effect in continuing this lease in force and effect during or after the primary term as to all of the land covered by the lease." Most critical, however, is the absence in the *Delatte* case, *supra,* of any limitation as to whether or not the drilling option may be exercised before or after pooling of the leased premises with adjacent tracts of land.

The "Pugh" Clause of a lease will divide the unitized leases and stratum from the balance of the lease so that full delay rentals are due; which "Pugh" Clause is recognized by the *Delatte v. Woods* decision, 232 La. 341, 94 So. 2d 281 at pages 288, 289.

In this case, at the time of the non-payment of the proper delay rental on May 5, 1958, when the Miller Lease automatically terminated under its provisions, there was in effect only a Conservation Order as to the two uppermost productive sand strata of the Miller Lease (See Plat I, appendix p. 35 and Plat III, appendix p. 37).

It is well settled in the Louisiana jurisprudence that in the event there is no conservation order as to deeper sands:

> "In the absence of no geological facts to the contrary (and, it should be noted, in the absence of payment and acceptance of delay rentals) *the remaining portions* of the leased premises should also be developed if the exploratory well is completed as a producer. This covenant is for the protection of the lessor against two kinds of harms which conceivably could transpire: (a) Failure to drill enough wells might result in the permanent loss of oil, and (b) A slower rate of production might result in a deprivation of the use of the capital represented by the unproduced royalty oil."

The impact of conservation laws and the impact of decisions upon the mutual obligations of the mineral

lease, James A. George, 24 La. Law Review, at page 575.

> "The typical spacing regulation applies only to a specific producing stratum. Therefore, this type of regulation does not seem to affect the implied covenant of further exploration as to sands not affected by the spacing order. If a given area has two or more producing sands, the well density at the surface may be much greater than that ordered for the wells going to only one particular stratum. Accordingly, it would appear that the lessor could prevail in a case in which he contended that the lessee had breached his covenant of further exploration, and that *the lessee would have no defense in the spacing order where his failure was to explore sands not affected by the order.*" I D at pages 586, 587.

The *Delatte* decision also recognized the validity of the "Pugh" Clause in a lease in order to require the drilling of additional wells after the unit well:

> "Plaintiffs further contend that the *unitization* of a portion of the leased premises *did not prohibit* or prevent the defendant from *performing* the drilling obligations *on that portion of the property not included within the unit.* We find the lease silent in that respect. *We therefore conclude that had the parties* to this lease *intended that drilling operations on the area not embraced within the unit would be conducted* by defendant Woods *as an obligation* flowing from said contract *that intention* would have been manifested and emphasized by express provisions contained in the lease."

Delatte v. Woods, 94 So. 2d 281, at pages 288, 289.

In other words, *Delatte* would have been decided differently if the lease contained a "Pugh" Clause or an express development clause. The Miller Lease has both.

It is well recognized by Louisiana law, as set forth in the Louisiana Law Review Article cited above, that the operator of the lease is obliged under the doctrine of implied development to drill to the deeper strata or strata outside the unit, and in this case, there are five sands which underlie the Miller Lease (see plat I, appendix p. 35) only two of which were unitized on May 5, 1958, and which were unitized as to the north one-half only of these sand strata as they underlie the Miller Lease premises.

The distinctions noted above with regard to the *Delatte* case, *supra*, are also attributive to the *Sohio* case, *supra*. This was later recognized by the Louisiana Supreme Court in the case of *Odom v. Union Producing Company*, 243 La. 48, 141 So.2d 649 (La. S. Ct. 1962).

The court in the *Odom* case, *supra*, had before it the following lease provision:

> "Lessee is hereby granted the power and right, at its option and without Lessors' joinder or further consent, at any time while this lease is in force, either before or after production, to combine and pool the lease, mineral and royalty rights in all the lands covered by this lease or any portion thereof with any other land, lands,

lease, leases, mineral and royalty rights or any of them, adjacent, adjoining or located within the immediate vicinity of this lease, whether owned by Lessee or some other person, firm or corporation so as to create by such combination and pooling one or more drilling or production units * * *. As between the parties hereto the entire acreage so pooled into a drilling or production unit or units shall be treated, for all purposes except the payment of royalties and the lieu royalties on the production from the pooled unit or units, as if it were included in this lease. In lieu of the royalties and the lieu royalties elsewhere herein specified, Lessors shall receive, on the production from each unit created hereunder, only such proportion of the royalties stipulated herein as the amount of Lessors' acreage (mineral or royalty rights) placed in the unit bears to the total acreage included in the particular unit involved * * *. If such operations be conducted on or production be secured from land in any pooled unit other than land covered by this lease, it shall have the same effect as to maintaining Lessors' and Lessee's rights in force hereunder as if such operations were on or such production from the land covered hereby, except that this effect shall be limited to the land covered hereby which is included in such pool unit."

Odom v. Union Producing Co., 141 So. 2d 649, at page 662.

It is to be noted from the above provision that this lease provided for the pooling *either before or after*

production, whereas under the Miller Lease, as previously mentioned, it was specifically provided that the drilling obligation had to occur before pooling of the leased premises. (R. 61.) This distinction was recognized by the Court in the *Odom* case, *supra,* wherein the Court made the following pertinent observation:

> *"Unlike the lease in that case, the present lease authorizes pooling after production and does not require the production to be from a well completed to production on the unit. Because of the variant lease provisions, we find the case inapplicable."*
>
> *Odom v. Union Producing Co., 141 So. 2d 649,* at page 664. (Emphasis added.)

The rule enunciated by the Court in the *Odom* case, *supra,* was observed by the District Court in the instant case, wherein the court, referring to the "unless clause", commented:

> "The language is definite. This is not an Odom ('Odom v. Union Producing Company' 141 So. 2d 649) lease. Unlike the lease here, the Odom lease authorized pooling after production and did not require as here that the drilling (spudding in) be after notice, after hearing, and after the issuance of the unitization order. There, the lessee drilled the well, timely delay rentals were paid throughout the primary term, timely 'lieu royalty' payments were tendered thereafter, the lease authorized voluntary pooling after production. On this phase of the instant case it is similar to Wilcox ('Wilcox v. Shell Oil Company' 226 La. 417, 76 So. 2d 416), where the lease required

that the pooling take place prior to drilling. Paragraph 3 of the instant lease expressly provides that the drilling (spudding in) must be after notice, after the hearing, and after the order of the Conservation Department. Here, the Durke Well was spudded in by a third party on land then not unitized with any portion of this lease. It was spudded in on March 4, 1957 and the Conservation Order was not issued until March 13, 1957. Under these facts and the unequivocal terms of the lease, the rights granted could be kept alive only by paying the specified delay rentals."

Miller v. Kellerman, 228 *F. Supp.* 446, at pages 460, 461.

The *Odom* case, *supra*, therefore recognized the limitation on the drilling obligation as embodied in Paragraph 5 of the Miller Lease. (R. 61.) This limitation stated simply requires pooling before drilling. This limitation on the drilling option has been judicially recognized by the Louisiana Supreme Court in *Wilcox v. Shell Oil Company*, 76 So. 2d 416 (La. S. Ct. 1954).

There is yet another reason why the conservation order, which pooled the north half of the Miller Lease, did not supersede the provisions of the "unless clause" (R. 61) of the Miller Lease. In this regard, we respectfully direct the court's attention to Paragraph 6 of the Miller Lease, (R. 64) which provides as follows:

"6. If in the exercise of the rights herein granted minerals be developed or produced in paying quantities in or on the premises or on acreage

pooled therewith, the said Lessee binds itself to thereafter proceed with the drilling (spudding in) of another well on the premises or on acreage pooled therewith within six months, from the date said last producer is brought in, and to so continue within the six months periods until full development of the property has been accomplished."

Paragraphs 3 and 6 of the Miller Lease must be read together inasmuch as both refer to the drilling obligation of the Miller Lease. The Durke Well was completed as a gas well on April 12, 1957. Accordingly, the completion of the Durke Well prior to the first delay rental date of May 5, 1957, imposed upon Kellerman the obligation to drill a well within six months from the completion of the Durke Well.

The District Court recognized this drilling obligation on the part of *Kellerman*, stating as follows:

"Defendants interpret Paragraph 6 as triggering a drilling obligation only when they drill a well on the leased premises or on land pooled with it. By brief they say: 'Surely it could not be construed to impose an obligation on the defendants because other lessees have drilled wells on other leases and a portion of the Miller Lease is included in units around such other wells.'

"We take a different view of the unequivocal language of Paragraph 6:

"'If in the exercise of the rights herein granted minerals be developed or produced in paying quantities in or on the premises or

> *on acreage pooled therewith,* the said lessee binds itself to thereafter proceed with the drilling of another well on the premises or on acreage pooled therewith within six (6) months * * * .'" (Emphasis added.)
>
> *Miller v. Kellerman, 228 F. Supp. 446,* at page 463.

The obligation to drill an additional well under the provisions of Paragraph 6 (R. 64), were in no way superseded by the conservation unit formed by the Conservation Commissioner. This order simply held the development of the unitized area to one unit well. Thus, although the Durke well was drilled on the unit created, which included the north half of the Miller Lease as to the C-6 and SD-1 sand strata only, a well or wells could have been drilled to the strata located outside the contents of these units, namely the SD-2, SD-3 and SD-4 Sands. This failure to drill additional wells after the completion of the Durke Well, terminated the lease under the automatic termination clause in Paragraph 20 of the Miller Lease (R. 77).

The decisions of the Louisiana Supreme Court in the *Odom* and *Wilcox* cases, *supra,* when considered in light of the provisions of the Miller Lease, make it abundantly clear that Kellerman failed to exercise his option to drill during the third year of the primary term of the Miller Lease. Kellerman, therefore, had either to pay the specified delay rental or terminate the lease. This he failed to do, resulting in the lease termination under its own terms as of May 5, 1958. *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119, (La. Sup. Ct. 1959).

II. THE UNITIZATION ORDER OF THE CONSERVATION COMMISSIONER AND THE PAYMENT BY KELLERMAN OF THE IMPROPER DELAY RENTAL DID NOT MAINTAIN THE NORTH HALF OF THE MILLER LEASE.

Petitioners, by way of alternative argument, propose that the erroneous payment of $3,900.00 on April 23, 1958 (R. 43) maintained the south half of the Miller Lease in effect since the northern half of the Miller Lease was contained in the unit established by the Conservation Commissioner. Presumably, on the basis of this argument, petitioners are reading into the Miller Lease a reduced delay rental provision for acreage outside a conservation unit. The fact is, the Miller Lease contains no proportionate acreage reduction clause, and in the absence of such a proportionate reduction clause, the entire delay rental of $7,800.00 was due on or before May 5, 1958, and was not paid.

It is further to be noted that the lessee in the instant case is given the right to retain and maintain acreage beyond the termination period of the lease only by the *actual production* of minerals. In this regard, Paragraph 9 of the Miller Lease (R. 72) provides as follows:

> "* * * That lessee's rights in and to that portion of the premises so retained shall enure only so long as lessee shall continue to produce sulphur, potash, oil, and other hydrocarbon minerals from said well or wells on said tract or tracts so retained or on acreage pooled therewith in paying quantities * * *" (R. 72, lines 16 through 21).

In addition to the clear and unambiguous language of the Miller Lease, the Louisiana Supreme Court, in the case of *Landry v. Flaitz,* 245 La. 223, 157 So. 2d 892 (La. S. Ct. 1963), squarely held that a shut-in well cannot retain acreage in the absence of *actual production.* The rationale of this rule is succinctly set forth by the court in the *Landry* case, *supra,* as follows:

> "Discovery of a well *capable* of producing minerals in paying quantities does not satisfy the requirement that oil, gas or some other mineral be produced under the habendum clause in order to continue the lease in full force and effect beyond the primary term. In the case of an oil well there must be actual production in progress at the time of the expiration of the primary term in order that the life of the lease may be continued beyond the primary term. This same rule applies whether the well is located on the leased premises, or the leased premises are included in a unit formed under existing laws and regulations. In Davis v. Laster, 242 La. 735, 138 So. 2d 558 (1962) we observed in connection with a similar lease that:
>
> " 'The plain language of the lease contract provides for its termination at the end of the primary term, unless it can be considered that oil, gas or other minerals are being produced from the leased premises or lands pooled therewith. The production required to maintain the lease must be either actual or constructive.'
>
> "Unitization orders issued by the Commission will not alter a requirement that there be pro-

duction to maintain the lease beyond the primary term to mean that the mere discovery of oil is sufficient to maintain the lease beyond the primary term.

"This proposition is supported by Cox v. Acme Land & Investment Co., 192 La. 688, 188 So. 742 (1939), wherein this court observed:

> " 'The discovery of oil or gas never extends the primary term of a mineral lease, which is that period stipulated by the parties during which the lease may be kept alive by means other than the actual production of oil or gas.'

"Not only must there be actual production of oil to maintain the lease beyond the primary term under the habendum clause, but that production should be understood to mean production in paying quantities in the absence of a stipulation that it should be production in paying quantities. Caldwell v. Alton Oil Co., 161 La. 139, 108 So. 314 (1926); Green v. Standard Oil Company of Louisiana, 146 La. 935, 84 So. 211 (1920).

"We are aware that in some jurisdictions 'discovery' rather than 'production' is sufficient to hold the lease beyond the primary term where the well was capable of production but had not in fact been produced. Williams, Oil and Gas Law, Sec. 604.1 (1962 ed.). However, such a result cannot obtain in this state in view of the language of the contested lease. LSA-Civil Code, art. 1901."

Landry v. Flaitz, 157 So. 2d 892, at page 895.

In summary, the Miller Lease contained a specified delay rental, with no proportionate acreage reduction clause. The failure of Kellerman to comply with this delay rental provision resulted in the automatic termination of the Miller Lease as to all acreage, both within and outside of the conservation unit. Furthermore, inasmuch as there was no actual production on the shut-in unit well, which well was located on a tract adjacent to the Miller Lease, the lease automatically terminated as to that portion of the lease contained in the conservation unit as well as the land outside the conservation unit.

III. THE FAILURE TO PAY THE PROPER DELAY RENTALS WAS NOT A MUTUAL MISTAKE AND MILLER HAD NOT WAIVED HIS RIGHT TO HAVE THE LEASE CANCELLED BY FAILING TO DEMAND THAT THE PROPER DELAY RENTAL BE PAID.

Petitioners' contention that the failure to pay the proper delay rental was the result of a pardonable error and that they should now be permitted to pay the proper delay rental is based solely on the case of *Jones v. Southern Natural Gas Co.*, 213 La. 1051, 30 So. 2d 34 (La. S. Ct. 1948).

The District Court after considering numerous Louisiana decisions on this question, commented on the applicability of the *Jones* case, *supra,* as follows:

> "We pass to defendants' next defense: that the error was an innocent one—a mutual one—and

that they should now (some five years later) be permitted to rectify it. In support of this defense, counsel cites and relies heavily on Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. 2d 34 (1948) and Davis v. Laster, 242 La. 735, 138 So.2d 558 (1962).

"These decisions have enunciated the principle that the right to dissolve a lease is subject to judicial control according to the circumstances. This idea is appealing, for it honestly concedes a breach but permits judicial control where the result would be onerous and the mistake is pardonable. Later decisions illustrate the reluctance of the Louisiana Supreme Court to apply this doctrine. (Atlantic Refining Company v. Shell Oil Company, 217 La. 576, 46 So. 2d 907 (1950); Johnson v. Smallenberger, 237 La. 11, 110 So. 2d 119 (1959); Rushing v. Griffin, 240 La. 31, 121 So. 2d 229 (1960); Broussard v. Phillips Petroleum Company, 160 F. Supp. 905, D.C. La. 1958, affirmed 265 F. 2d 221. Surely, great caution must be exercised in utilizing judicial power to revitalize an agreement that has been terminated by its own terms. In my judgment, the circumstances warranting the application of such power must appear of record with the greatest and most convincing clarity.

"Surely, under the facts of this case, Jones and Laster are not controlling. Laster has no relevance and Jones is easily distinguishable. In Jones (supra) the original lease covered 518 acres, more or less, at an annual rental charge of $1.00 per acre. The lease provided that in the

event of an assignment in whole or in part, the rental payments were to be apportioned ratably according to the surface area of each. The defendant became the assignee of a portion of the lease and on the due date for rental payment in 1944 deposited $300 to the credit of plaintiff, which amount was arrived at by defendant's computation that the area covered by its assignment comprised 300 acres (this was pegged on the reasonable assumption that a section contained the regulation 640 acres). Again, on the due date in 1945, the amount of $300 was deposited but shortly thereafter plaintiff sought a decree of forfeiture. There was and still is a grave question as to how much acreage was included in the assignment. Three different surveyors surveyed the land and each came up with a different result. One concluded that there were exactly 300 acres covered; one came up with the conclusion that there were 320 acres involved. Louisiana's Supreme Court, sharply divided, held that under those circumstances the mistake was normal, justified and innocent, and that equity should intervene. But, the Court, in speaking of the likelihood of error in ascertaining the amount of acreage involved, was quick to point out:

> " '* * *this case is different from one where the lessor has stated in the lease, in dollars and cents, the exact amount of the annual rental which must be paid by the lessee, and where there has been no assignment of a segregated part of the land covered by the original lease.'

"The distinction pointed out by the Supreme Court in Jones and quoted above constitutes precisely the facts of instant case where the amount of rental was pointed out in dollars and cents to be $7,800, and the lease was still intact in its entirety."

Miller v. Kellerman, 228 F. Supp. 446, at pages 457, 458.

In the instant case, there can be no question, under the provision of Paragraph 3 of the Miller Lease (R. 61) what the correct delay rental was. This being so, the failure to pay the proper delay rental terminated the lease by its own terms. *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119 (La. S. Ct. 1959). This conclusion is further evidenced by the language of the Louisiana Supreme Court in the case of *Bollinger v. Texas Company,* 232 La. 637, 95 So. 2d 132 (La. S. Ct. 1957), wherein the court observed:

"A Lessee must comply with his lease terms. Whether production payments are larger or smaller than 'shut-in' payments, they must be paid on accurate computations and as such. Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease—not at the whim or caprice of the defendant. Where the whim of defendant could or might affect a Lessor's rights under a lease, courts should always (as we are doing here) intervene to protect those rights."

Bollinger v. Texas Company, 95 So. 2d 132, at page 137.

Also apropos is the following excerpt from *Johnson v. Smallenberger, supra:*

> "Counsel's error arises from the fact that they rely on statements taken from the above cases and attempt to apply them to the instant case, where the factual situation is different. The Jones case is clearly inapplicable; it involved an erroneous calculation by one of the assignees of a mineral lease as to the area covered by his designated portion, this miscalculation having resulted in payment (and acceptance) of a lesser amount than was actually owed as delay rental; but under the circumstances this was held (by the majority view) to be an excusable and mutual mistake, and not sufficient to 'demand a forfeiture' (of the lease so far as it affected the defendant-assignee's portion) for nonpayment of the rental within the time stipulated.' (213 La. 1051, 36 So. 2d 38.) The Risinger case, relied on particularly for the plea of estoppel and said to be so similar factually that portions are paraphrased in defendant's brief, is equally inapplicable. A perusal of that case shows its holding to be that an erroneous method of payment, by deposit in the wrong bank, of a stipulated yearly royalty of $200 for a gas well (*there being no provision that the lease would automatically terminate for its non-payment,* delay or error in payment), was 'merely a failure to perform with literal exactness a personal obligation *and not a failure to perform a condition precedent to the continuance of the lease.*' 198 La. at page 116, 3 So. 2d at page 294.

"Under the facts of the instant case, the lease was at an end immediately upon non-payment of the rental due on May 6, 1956. According to the plain provisions of the type of contract known as the 'unless' lease, as universally interpreted, the lessee is under no duty either to drill or to pay delay rentals; if he either drills or pays, the lease remains in effect, but if he does neither, it ipso facto terminates at the time of default. See 2 Summers, Oil & Gas, Perm. Ed., Sec. 452, pp. 494-499. 'The clause * * * is used, not for the purpose of fixing a duty upon the lessee to drill or pay, but to state a limitation upon which the lease terminates if these acts are not performed.' Ibid., pp. 494-495."

Johnson v. Smallenberger, 110 So. 2d 119, at pages 121, 122.

Petitioners' argument of waiver or estoppel because of respondent's silence as to the correct delay rental is equally without merit, and has been refuted by the Louisiana Supreme Court on numerous occasions.

In this regard it has been repeatedly held that where the contractual termination is plainly set forth, no estoppel or waiver may be invoked to set aside this automatic termination. Accordingly, considerations of equity are not admissable for the determination of contractual rights clearly expressed. *Baker v. Potter,* 223 La. 274, 655 So. 2d 598 (La. S. Ct. 1953).

That this rule also applies to the automatic termination clause of a mineral lease, is evidence by the

court in *Johnson v. Smallenberger, supra,* wherein the court enunciated the following rule:

> "It is well settled that to give rise to estoppel by silence or inaction, there must be not only an opportunity to speak but also an obligation or duty to do so; 'There must be some element of Turpitude or negligence connected with the silence or inaction by which the other party is misled to his injury' (19 Am. Jur. 663-664, Verbo Estoppel, Sec. 55); and the plaintiff was neither under a duty to notify the defendant that the latter had failed to pay the amount of rental nor to give him an opportunity to repair the lapse. Defendant's efforts to place such a duty on plaintiff can avail him nothing."
>
> *Johnson v. Smallenberger, 110 So. 2d 119,* at page 122.

CONCLUSION.

For the reasons above discussed, and on the basis of the authorities cited, it is respectfully submitted that the District Court and Court of Appeals correctly held that the Miller Lease terminated under its own terms and should be cancelled according to the judgment rendered by the District Court and subsequently affirmed by the Court of Appeals. Respondent therefore submits that this Honorable Court should deny petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in R. E. Kellerman et al vs. Preston J. Miller.

Respectfully submitted,

DOMENGEAUX & WRIGHT,

By .....
JAMES DOMENGEAUX,

By .....
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CERTIFICATE.

I, the undersigned, do hereby certify that copies of the within briefs were duly served on petitioners' attorney, Mr. J. Mort Walker, by placing a copy thereof in the United States Mail, postage prepaid, under cover addressed to him at his address of record in these proceedings, this 3rd day of May, 1966.

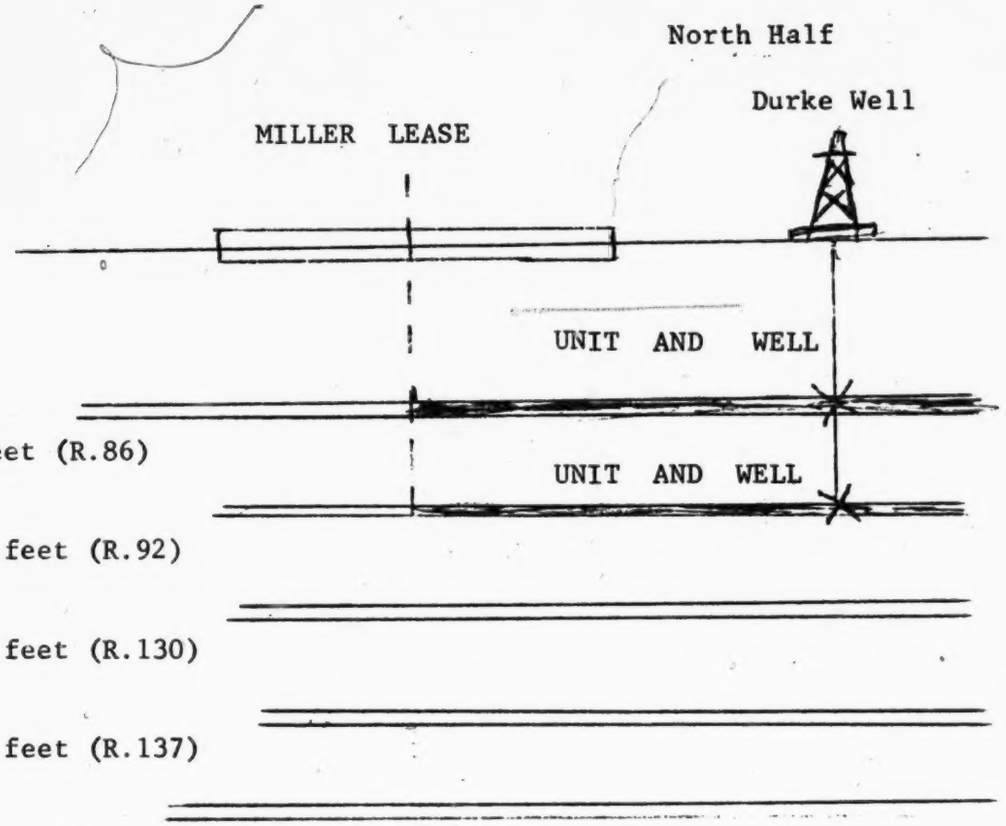
JAMES DOMENGEAUX.

MILLER LEASE:

DURKE WELL:
North Half Only

Shut-in: No Production

May 5, 1958:



Cristellaria - 6 Sand Stratum:
Cons Order 367: depth of 11,552 to 11,682 feet (R.86)

Siphonina-davisi - 1 Sand Stratum:
Cons.Order 367 A; depth of 11,804 to 11,833 feet (R.92)

Siphonina-davisi - 2 Sand Stratum:
Cons.Order 367 C; depth of 11,975 to 12,007 feet (R.130)

Siphonina-davisi - 3 Sand Stratum:
Cons.Order 367 D; depth of 12,163 to 12,201 feet (R.137)

Siphonina-davisi - 4 (Nunez) Sand Stratum:
Cons.Order 367 B; approximate depth of 12,304 feet (R.110); (Stipulation XIX; R. 47)

PLAT I

WALTER DURKE WELL:

SPUDDED MARCH 4, 1957

COMPLETED APRIL 12, 1957:
Well # 1-D C-6 Sand
Well # 1 SD-1 Sand (NO UNIT)

NO PRODUCTION : SHUT IN (R.41)

CONS. ORDER #867 3-18-57

POOLED C-6 ONLY : NO UNIT SD-1 SAND

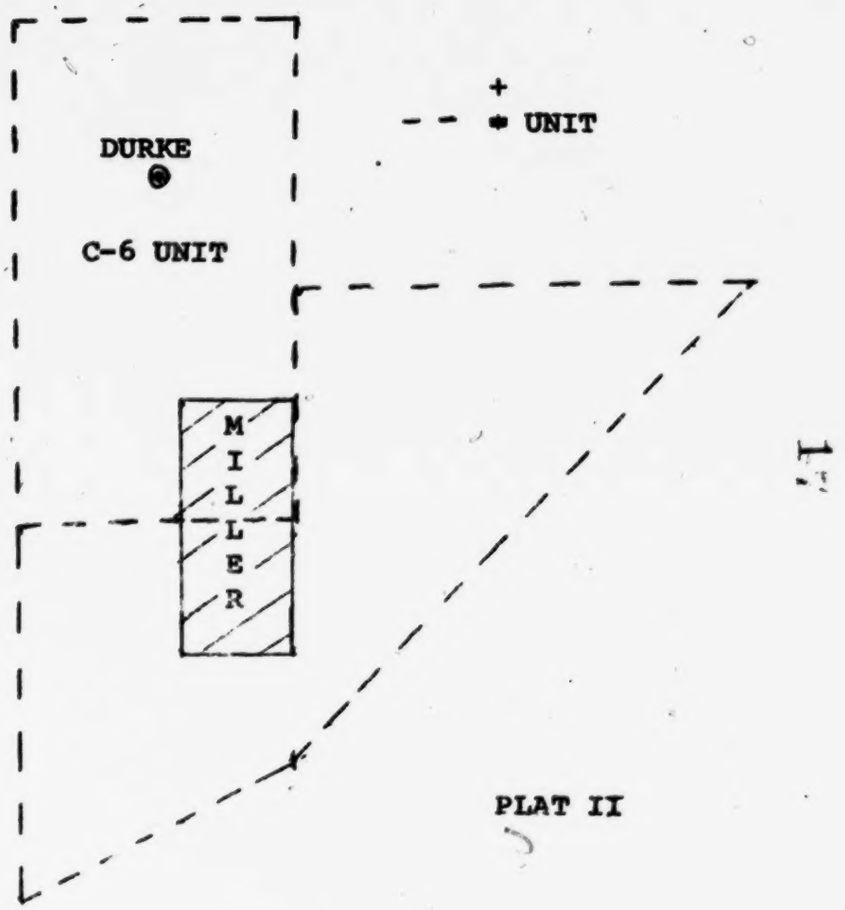
DELAY RENTAL OF $ 3900 DUE TO

MAINTAIN LEASE FOR ONE YEAR

WITHOUT ADDITIONAL DRILLING

PAID BEFORE DELAY RENTAL DATE

OF MAY 5, 1957 (R. 41,90).



PLAT II

By the date of the SECOND delay rental due date, May 5, 1958, the situation was changed as shown below only in that the north half was then unitized as to the SD-1 sand:

DURKE WELL: STILL SHUT IN

CONS. ORDER # 367-A 11-6-57

POOLED SD-1 SAND: SAME UNITS

AS C-6 SAND (R. 42, Plat R.90)

MILLER LEASE:

DELAY RENTAL DUE MAY 5, 1958 $ 7800

RENTAL PAID 4-23-58 (R. 43) $ 3900

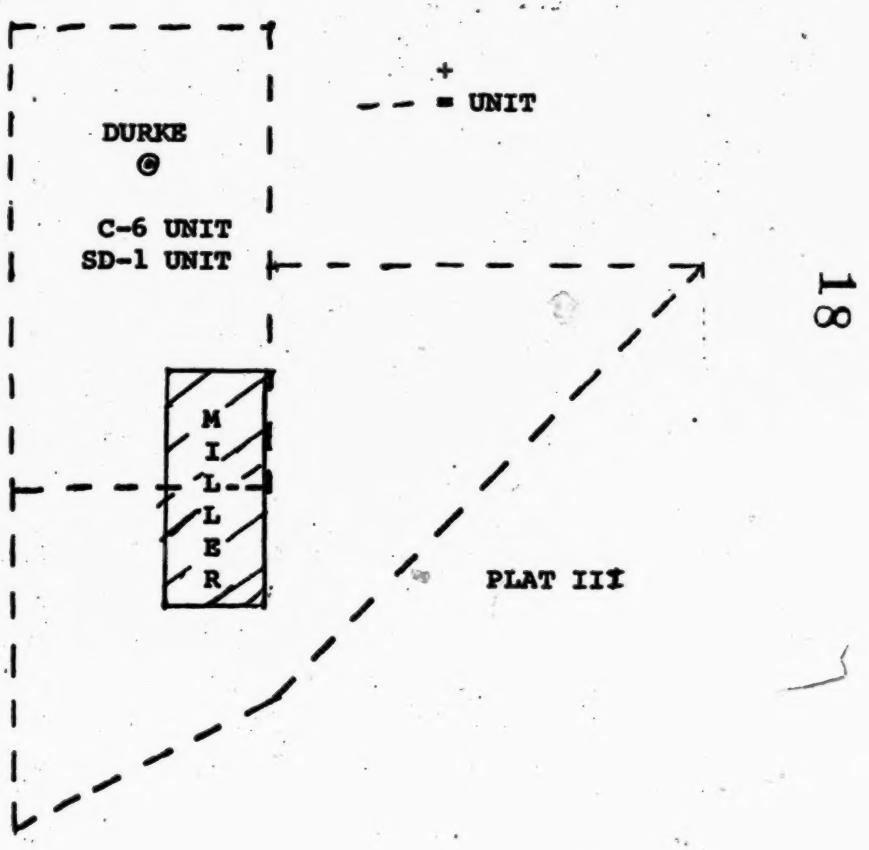
LEASE TERMINATED FOR NON-PAYMENT

OF FULL DELAY RENTAL MAY 5, 1958.

NO DRILLING IN PROGRESS, NO WELL

IN PRODUCTION, NO DEVELOPMENT OF

SOUTH HALF OF MILLER TRACT.



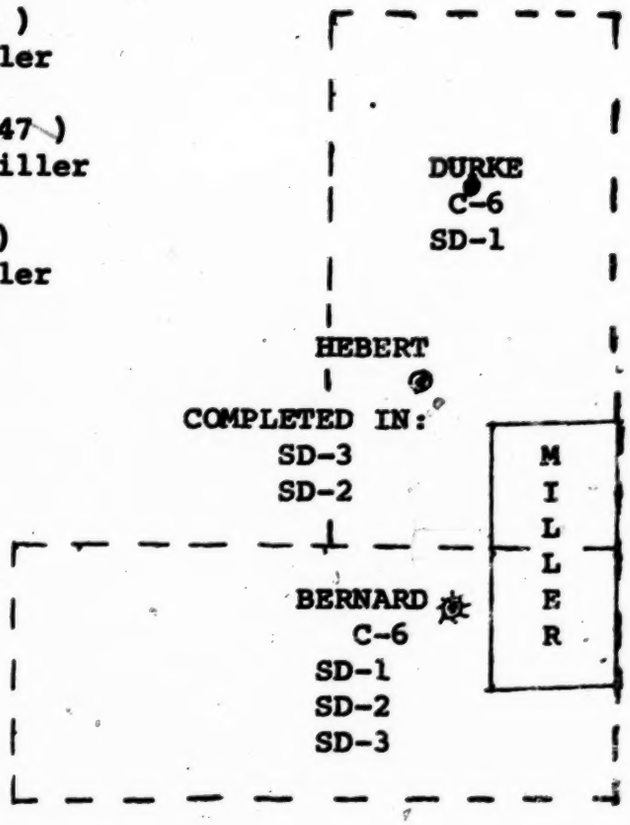
BERNARD WELL (R. 45)
400 feet from Miller

NUNEZ WELLS (R. 46,47)
1,220 feet from Miller

HEBERT WELL (R. 45)
800 feet from Miller

SEE PLAT R. 108

NO UNIT AS TO
SD-2, SD-3 OR
SD-4 SANDS.



\+
— — = UNITS
(C-6 & SD-1 ONLY

NUNEZ (R. 46, 47)
#1-A
#1

C-6	C-6
SD-1	SD-1
SD-2	SD-2
SD-3	SD-3
*	SD-4

PLAT IV